Supreme Court, U.S.
FILED
DEC 20 1993
THE CLERK

No. 93-620

In the Supreme Court of the United States

OCTOBER TERM, 1993

MILENA SHIP MANAGEMENT COMPANY, LTD., ET AL.,
PETITIONERS

v.

R. RICHARD NEWCOMB, DIRECTOR,
OFFICE OF FOREIGN ASSETS CONTROL,
DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Treasury Department's Office of Foreign Assets Control reasonably determined that vessels operated by petitioners were subject to Executive Orders blocking all property in which the Federal Republic of Yugoslavia has an interest.

2. Whether the court of appeals erred in refusing to issue a writ of mandamus directing the government to maintain petitioners' vessels.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 995 F.2d 620. The order of the district court denying petitioners' motion for summary judgment (Pet. App. 36a-43a) is reported at 804 F. Supp. 859. The order of the district court denying appointment of a custodian (Pet. App. 29a-35a) is reported at 804 F. Supp. 855. The order of the district court denying preliminary relief (Pet. App. 11a-28a) is reported at 804 F. Supp. 846.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1993. The petition for a writ of certiorari was filed on October 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. To combat state-sponsored violence in former Yugoslav territory, President Bush issued two Executive Orders in 1992 that imposed comprehensive sanctions against the unrecognized Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) (hereinafter Yugoslavia). Exec. Order No. 12,808, 3 C.F.R. 305 (1992 comp.), *reproduced at* Pet. App. 46a-49a; Exec. Order No. 12,810, 3 C.F.R. 307 (1992 comp.), *reproduced at* Pet. App. 50a-55a. Among other provisions, the orders instructed the Secretary of the Treasury, in consultation with the Secretary of State, to "block" all property and interests in property of the Yugoslav government. Exec. Order No. 12,808, §§ 1, 2, 5, Pet. App. 46a-48a; Exec. Order No. 12,810, §§ 1, 6, Pet. App. 50a-51a, 54a-55a.

The first of those orders was issued pursuant to powers vested in the President by the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701-1706. Pet. App. 46a. The second order invoked both the IEEPA and the United Nations Participation Act of 1945 (UNPA), 22 U.S.C. 287c. Pet. App. 50a. The executive orders implement sanctions previously adopted by the United Nations in Security Council Res. No. 757 (1992).

b. To implement the executive orders, the Treasury Department's Office of Foreign Assets Control (OFAC) issued orders implementing the blocking of all property located in the United States owned or

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a. Petitioners assert (Pet. 8-13) that OFAC exceeded the scope of the executive orders and violated the Due Process Clause in adopting a presumption that entities located within Serbia and Montenegro are owned or controlled by the Yugoslav government. As the court of appeals held, however, the presumption was a reasonable method of implementing the President's executive orders in light of the history of government involvement in Yugoslav business enterprises and the need for immediate action to enforce the United Nations resolutions. Pet. App. 6a-7a. Nothing in either the text of the executive orders or the Due Process Clause precluded OFAC's adoption of such a presumption, which was reasonably designed to further the purposes of the executive orders.[1]

b. Petitioners contend (Pet. 13-14) that the administrative record does not adequately support OFAC's initial adoption of the presumption that the Yugoslav government owns or controls entities located in Serbia and Montenegro. For the reasons set forth above, however, the agency acted appropriately in adopting the presumption based on its knowledge of prior Yugoslav law and on the absence of any basis for concluding that conditions had significantly changed in Serbia and Montenegro. See Pet. App. 6a-7a, 107a.

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[1] Petitioners err in contending (Pet. 12) that OFAC's conclusion is inconsistent with other judicial and administrative determinations regarding the Yugoslav economy. None of those rulings or statements involved the executive orders at issue here or construed current Yugoslav law, which gives the government a direct financial interest in the "social capital" of Yugoslav business enterprises.

In any event, even if the record had been inadequate to support the agency's initial blocking orders, any such inadequacy would have been more than remedied by OFAC's detailed decision rejecting petitioners' application for unblocking of the vessels. See Pet. App. 102a-118a. Contrary to petitioners' assertions, that decision was not an impermissible "post hoc rationalization[]" (Pet. 13) for the agency's past actions. Rather, in issuing that decision, OFAC properly considered the additional materials submitted by petitioners in support of their application and concluded that the presumption of government control of Yugoslav entities and the continued blocking of petitioners' vessels were justified. Petitioners point to no authority for the proposition that an agency is precluded from relying on all properly submitted materials in considering whether to grant an application for administrative relief, and we are aware of none.

Moreover, if petitioners had sought review of the original emergency blocking notice, and a court had deemed OFAC's explanation inadequate, the appropriate course would have been a remand to the agency to allow it to supplement the record and fully explain its decision. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Thus, even if petitioners were correct in claiming that the agency's initial orders lacked record support, they would not be entitled to any relief, because the agency's decision rejecting petitioners' application for unblocking amply demonstrates the propriety of the continued blocking of petitioners' vessels.

c. Petitioners claim (Pet. 15-18) that OFAC misinterpreted Yugoslav law when it concluded that the Yugoslav government has an interest in JOP within

the meaning of the executive orders.[2] That fact-bound contention is incorrect, and does not merit further review.

The court of appeals correctly held that, under any standard of review, the Yugoslav government had an interest in petitioners' vessels. Under the economic system established by the government of the former Yugoslavia, business enterprises were "socially-owned" and were managed by "workers' councils." Pet. App. 107a-108a. In 1989, the government enacted statutes to permit the sale of shares in these "socially-owned" firms. Under those laws, "if the 'social capital' [of the firm] is sold, the proceeds are to be deposited into development 'Funds' established by the governments of each [Yugoslav] republic." *Id.* at 108a. The Funds "appear to be an arm of [the] government" (*ibid.*), and were established to accomplish a variety of governmental purposes, including lending for privatization, public investment in troubled firms, and investments for pensions. *Id.* at 109a, citing Montenegro Law on the Transformation of Management (LOMT), arts. 37, 45.

Alternatively, an enterprise may choose merely to add to its capital by issuing new shares and retaining the proceeds. In that event, the social capital remains in the business and will be claimed by the government if the enterprise is later sold or liquidated. Pet. App. 109a-110a, 114a-115a. JOP selected this

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[2] Petitioners' suggestion (Pet. 15) that the court of appeals gave improper deference to the agency's interpretation of foreign law is without foundation. The court made clear that it would sustain OFAC's decision even applying de novo review. Pet. App. 7a. Moreover, the court could properly have deferred to the expert view of the agency charged with regulation of foreign assets under the executive orders.

latter approach to privatization, and thus the government retains an interest in JOP's social capital. *Id.* at 111a-116a.

In addition to the government's continuing financial interest in the social capital of JOP and similar companies, applicable law gives the government sweeping powers over such entities. For example, under Article 49 of the LOMT, the government is authorized to designate the management of privatized companies and to take over an enterprise under a variety of circumstances, such as when the enterprise sustains a business loss. Pet. App. 112a. As the court of appeals concluded (*id.* at 7a), "society has an interest in each business enterprise" within the meaning of the executive order, even if the scope of the interest cannot be precisely defined. Thus, OFAC properly concluded that Yugoslav law continues to give the government an interest in Yugoslav entities such as JOP.

2. Finally, petitioners contend (Pet. 18-19) that the court of appeals erred in denying their petition for a writ of mandamus directing appointment of a custodian for their vessels. Petitioners do not identify any statutory authority for such an order, however. Instead, they urge that mandamus is required because the blocking order constitutes a taking without just compensation.

Even if we assume *arguendo* that petitioners' taking claim is valid, petitioners are not entitled to the relief they seek. The Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church* v. *County of Los*

Angeles, 482 U.S. 304, 315 (1987). Thus, even if petitioners had a valid claim for just compensation under the Fifth Amendment, they would have no basis for seeking appointment of a custodian.

3. Finally, even if the questions presented by petitioners were otherwise appropriate for review by this Court, this case would not present a proper vehicle for resolving those questions. Petitioners' claims have effectively been mooted by Exec. Order No. 12,846, 58 Fed. Reg. 25,771 (1993), which blocks all property and interests in property of *all* entities within the territory of the Yugoslav government, regardless of their governmental affiliation. The order further confirms that all expenses incident to the blocking and maintenance of property blocked under that order or Exec. Order Nos. 12,808 and 12,810 "shall be charged to the owners or operators of such property." 58 Fed. Reg. 25,771 (1993). Thus, it is clear that petitioners' vessels are now blocked, and that petitioners' requested mandamus relief is precluded, by the express terms of Exec. Order No. 12,846. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1993